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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT
(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

LACY HARTER and MIKE McCLELLAND,
As Co-Personal Representatives of the Estate of
KEGAN McCLELLAND, Deceased and LACY HARTER,
Individually and MIKE McCLELLAND, Individually,

Plaintiffs-Appellees,

vs.

GRAND AERIE FRATERNAL ORDER OF EAGLES,

Defendant-Appellant,

and
HOWELL AERIE #3607 FRATERNAL ORDER
OF EAGLES,

Defendant-Appellee,

and-

MICHIGAN STATE AERIE FRATERNAL ORDER
OF EAGLES, HARRIS SEPTIC CLEANING AND
ALWAYS CLEAN PORTABLE TOILETS, INC.,
DALE HARRIS, Individually, and AMERICAN
CONCRETE PRODUCTS, INC., Individually,

Defendants, Not Participating.

Supreme Court Docket No:126255

COA Docket No: 244689
L.C. Case No. 00-17892-NO
HON. DANIEL A. BURRESS

COURT OF APPEALS PANEL:
HON. JESSICA COOPER
HON. KAREN FORT HOOD
and
DISSENTING:
HON. PETER D. O'CONNELL

MCR 7. 212 (G) SUPPLEMENTAL AUTHORITY BRIEF NO. 2

126255
Supl
Auth

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MCR 7.212 (G) SUPPLEMENTAL AUTHORITY BRIEF NO.2

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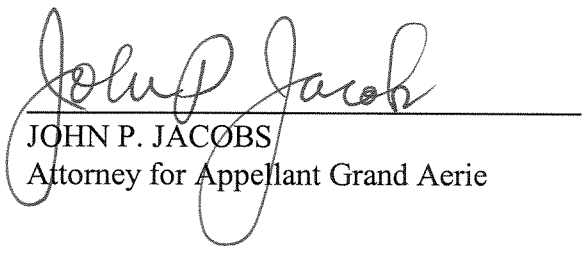
Michigan has very recently joined the chorus of virtually all states condemning "Mary Carter"-style agreements in that they prejudice the nonsettling defendants at trial if the Jury has not been plainly told that the plaintiffs have compromised the case with certain settling defendants who nevertheless remain active in the case for purposes, as here, of offering plaintiffs various forms of secret litigation assistance. In Hashem v. Les Stanford Oldsmobile, et al., 266 Mich App 61, 81-87 (April 21, 2005), leave pending under Docket Nos. 129087/129088, a virtually identical "High-Low" Agreement was held to be reversibly prejudicial in a case in which the settling defendants continued to participate at trial as if they were still adverse to the plaintiffs; this stealth performance involving a secret alliance by which the Jury was necessarily misled as to the true biased orientation of the parties. Their actual motivations were recognized as depriving the nonsettling defendants there of a fair trial in the nature of "Mary Carter"-style agreements as entirely contrary to a fundamentally fair trial. The Bazzi Trial Court was instructed on remand to fashion advice to the Jury which disclosed the true alignment of the parties. This clearly necessary disclosure to the Jury has also been the ethical position of the American Bar Association for nearly thirty (30) years. See ABA Informal Ethics Op 1386 (1977). This Mary Carter-style agreement in Harter capped the liability of Defendant Howell #3607, allowing it to remain in the litigation, looking silently guilty, while the jury was none the wiser. The Harter panel justified this injustice based on Brewer v. Payless Stations, Inc., 412 Mich 673 (1982), but Brewer only applies to settling parties who **leave** the litigation, not to those who have no real interest in the case except to remain to wreak havoc secretly. In light of Bazzi, the verdict below should be peremptorily reversed.

Respectfully Submitted,



JOHN P. JACOBS
Attorney for Appellant Grand Aerie

STATE OF MICHIGAN

COURT OF APPEALS

AL HASHEM, as Personal Representative of the Estate of RONNY HASHEM, Deceased,

Plaintiff-Appellee,

v

LES STANFORD OLDSMOBILE, INC.,

Defendant-Appellant

and

MOHAMAD BAZZI,

Defendant-Appellant-Appellee,

and

HASSAN BAZZI, ABDALLAH NAGIA, SHINA INC., d/b/a SAK'S PARTY STORE, a/k/a SAL'S PARTY STORE, and HURON ENTERTAINMENT CORP., d/b/a CLUTCH CARGO'S,

Defendants,

and

SHINA INC., d/b/a SAK'S PARTY STORE, a/k/a SAL'S PARTY STORE, and HURON ENTERTAINMENT CORP., d/b/a CLUTCH CARGO'S,

Cross-Plaintiffs,

v

MOHAMAD BAZZI and HASSAN BAZZI,

Cross-Defendants.

FOR PUBLICATION
April 21, 2005
9:00 a.m.

No. 245939
Wayne Circuit Court
LC No. 00-011717-NI

AL HASHEM, as Personal Representative of the Estate of RONNY HASHEM, Deceased,

Plaintiff-Appellant/Cross-Appellee,

v

No. 249977
Wayne Circuit Court
LC No. 00-011717-NI

LES STANFORD OLDSMOBILE, INC.,

Defendant-Appellee/Cross-Appellant,

and

MOHAMAD BAZZI,

Defendant-Appellee/Cross-Appellee,

and

HASSAN BAZZI, ABDALLAH NAGIA, SHINA INC., d/b/a SAK'S PARTY STORE, a/k/a SAL'S PARTY STORE, and HURON ENTERTAINMENT CORP., d/b/a CLUTCH CARGO'S,

Defendants,

and

SHINA INC., d/b/a SAK'S PARTY STORE, a/k/a SAL'S PARTY STORE, and HURON ENTERTAINMENT CORP., d/b/a CLUTCH CARGO'S,

Cross-Plaintiffs,

v

MOHAMAD BAZZI and HASSAN BAZZI,

Cross-Defendants.

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ

HOEKSTRA, J.

In these consolidated appeals, defendants Les Stanford Oldsmobile and Mohamad Bazzi (hereinafter collectively referred to as "defendants") appeal as of right from a judgment, entered following a jury trial, awarding plaintiff Al Hashem, as personal representative of the estate of his son, Ronny Hashem, $12 million as noneconomic damages on his claim for wrongful death. By leave granted, plaintiff also appeals, and defendant Les Stanford Oldsmobile cross-appeals, from the trial court's post-judgment order limiting defendants' joint and several liability for satisfaction of the judgment to their pro rata share of comparative negligence, as determined by the jury. Because we conclude that the trial court erred in granting a directed verdict in favor defendant Sak's Party Store, and in finding defendant Les Stanford Oldsmobile to be jointly and severally liable for the entirety of the judgment under MCL 600.6312(b)(iii), we reverse and remand.

I. Basic Facts and Procedural History

A. The Accident

This case arises from a July 1999 automobile accident in which a vehicle owned by defendant Les Stanford Oldsmobile and being driven by defendant Mohamad Bazzi struck the rear of a semi-trailer then flipped, killing Ronny Hashem (the "decedent") and seriously injuring Kassem Anani, both of whom were passengers in the vehicle at the time of the accident. Mohamad Bazzi, who was intoxicated at the time of the crash, was subsequently convicted of negligent homicide, MCL 750.324, and one count each of operating a motor vehicle under the influence of intoxicating liquor causing death, MCL 257.625(4), and serious personal injury, MCL 257.625(5).

At the May 2002 trial it was shown that, before his death, the decedent was one of a group of five teen-aged friends consisting of himself, Mohamad Bazzi, Kassem Anani, Sammy Johair, and Hassan Bazzi.[1] On the night of the accident the group had made plans to attend a weekly "teen night" at defendant Clutch Cargo's, a Detroit-area dance club often frequented by the group. In accordance with these plans Mohamad, Kassem, and the decedent traveled in Mohamad's new Chevrolet Camaro convertible automobile to Sammy's home, where they met both Sammy and Hassan. Mohamad had received the Camaro from Les Stanford Oldsmobile the previous day and was in the process of purchasing the car from the dealership. It was not disputed at trial that, as the owner of the vehicle at the time of the accident, Les Stanford Oldsmobile was statutorily liable for any damages arising from the negligent operation of that vehicle by Mohamad. See MCL 257.401(1).

After meeting Sammy and Hassan, the group traveled to Sak's Party Store, with Kassem and the decedent riding with Mohamad in the Camaro and Sammy riding with Hassan in

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[1] For ease of reference, each of these individuals will hereinafter be referred to by his first name.

Hassan's late model Chevrolet Corvette. At approximately 10:45 p.m. the group arrived at the store, where Mohamad purchased two twenty-two ounce bottles of malt liquor and Kassem and the decedent each purchased gin and orange juice. Mohamad testified that this was not the first time he and the decedent had been to Sak's Party Store, where it was known to all his friends that a minor could unlawfully purchase alcoholic beverages simply by paying a surcharge of between two and three dollars. After obtaining their beverages, Mohamad, Kassem, and the decedent left the party store for Clutch Cargo's, traveling along northbound Interstate 75 ("I-75"). Sammy and Hassan, who were to join the others at Clutch Cargo's later that evening, went first to a "downtown" bar.

Once on I-75, Mohamad began drinking the first of his two beers while Kassem and the decedent shared the gin and orange juice. However, on the way to the club Kassem and the decedent began feeling sick, prompting Mohamad to pull to the side of the freeway to allow them to vomit. At trial, there was a conflict in the testimony regarding what exactly occurred along the side of I-75. According to Mohamad, the trio decided to throw their remaining alcohol away, including Mohamad's second, unopened beer, after which there was no alcohol left in the vehicle. Mohamad further claimed that he consumed no more alcohol that night. Kassem, however, recalled Mohamad having drank the entire way to the club, and also recalled having seen Mohamad consume what he believed to be alcohol while at the club. The three then continued on to Clutch Cargo's, arriving at the club at approximately 12:00 a.m.

After parking the Camaro, Mohamad, Kassem, and the decedent entered the club, where they were met by Sammy and Hassan approximately one hour later. At approximately 2:00 a.m. the group left the club together and drove to a nearby gasoline station where Mohamad engaged in an admittedly heated and profane argument with the station attendant. Mohamad then got back into the Camaro with Kassem and the decedent, and left the gasoline station for home. None of the three occupants were wearing their seatbelts at that time.

Although acknowledging that he was mad following the argument with the station attendant, Mohamad denied that he was intoxicated at the time he left the station and testified that there was no reason for anyone to have taken his keys from him.[2] Mohamad further testified that the last time he had consumed any alcohol that evening was sometime between 11:00 and 11:30 p.m. while en route to Clutch Cargo's and that, other than water, he had nothing to drink while at the club.

After leaving the gasoline station and entering southbound I-75, Mohamad accelerated to a speed of approximately ninety miles per hour. Mohamad testified that he knew that he was

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[2] Hassan testified that although angry, Mohamad was neither slurring his words nor staggering at that time. Nonetheless, Hassan acknowledged that because Mohamad was so upset he was "a little bit concerned" about Mohamad and the safety of his passengers. Consequently, after Kassem and the decedent also expressed concern over Mohamad's behavior, Hassan attempted to persuade Mohamad to allow Sammy to drive Mohamad and the others home. However, when Mohamad became angry, Hassan decided to drop the matter in order to avoid an argument with Mohamad. Mohamad then abruptly left the gasoline station in the Camaro and drove toward I-75, with Kassem and the decedent also in the car.

exceeding the posted speed limit of seventy miles per hour and recalled that the decedent put his seatbelt on shortly after he began speeding. Mohamad indicated at trial that he believed the decedent decided to put the seatbelt on because he was "scared." He could not, however, recall whether the decedent or Kassem ever asked that he slow down. In contrast, Kassem testified that both he and the decedent begged Mohamad to slow down, and that it was only after Mohamad failed to even acknowledge their pleas that the decedent put on his seatbelt.

Mohamad testified that as he drove in the far right-hand lane of southbound I-75 he spoke to no one, but recalled seeing Sammy and Hassan following in the Corvette. Mohamad denied that he was racing with Hassan and recalled Sammy having motioned at one point for him to slow down. Mohamad did not, however, heed Sammy's appeal to reduce his speed. Shortly thereafter, Mohamad observed a semi-tractor and trailer ahead of the Camaro, also traveling in the far right-hand lane. At trial, Mohamad estimated the semi to have been traveling at a speed of between fifty-five and sixty miles per hour and testified that when he first observed the semi the Corvette was in the center lane, to the left and just behind the Camaro. However, as he approached the semi and attempted to pass by moving around that vehicle into the center lane, Hassan increased the speed of the Corvette in an apparent attempt to keep Mohamad behind the semi and thereby force Mohamad to slow. Mohamad testified that he could see Hassan waving at him to slow down, but that he chose instead to attempt to change lanes by "swerv[ing]" between the Corvette and the semi-trailer. However, while attempting the maneuver the Camaro struck the left rear wheel of the semi trailer, causing the Camaro to flip. After hitting the trailer Mohamad and Kassem "flew" out of the car. The decedent, however, was still belted into the vehicle and remained in the car as it flipped onto its top then slid across the freeway and into the median.

Mohamad testified that he believed his attempt to pass would have been successful if the Corvette, which passed the Camaro just as the accident occurred, would not have been obstructing his path.[3] He acknowledged, however, that it was his speeding that caused the accident and thus the decedent's death. A blood draw taken from Mohamad approximately one hour after the accident indicated that at the time of the draw Mohamad had a blood alcohol level of .11 grams per deciliter of blood.

B. The Verdict and Post-Judgment Proceedings

Following the close of plaintiff's proofs, both Clutch Cargo's and Sak's Party Store were dismissed from the suit on separate motions for a directed verdict. Mohamad and Hassan were thereafter found by the jury to have negligently caused the decedent's death. Although the decedent was also found to have been comparatively negligent, the jury concluded that the

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[3] Both Sammy and Hassan denied that Hassan ever used the Corvette to attempt to stop Mohamad from passing the semi, and estimated that the Corvette was approximately one hundred feet behind the Camaro at the time of the crash. Although this testimony was consistent with the accident reconstructionist's conclusion that the Corvette was traveling "somewhat towards the rear" of the Camaro at the time of the crash, eye witness testimony placed the Corvette next to the semi-trailer and slightly in front of the Camaro at the time of the crash.

decedent's negligence was not a proximate cause of his death and apportioned fault between Mohamad and Hassan at seventy and thirty percent, respectively. Plaintiff was thereafter awarded $1 million for noneconomic damages incurred from the date of the decedent's death until verdict, and $11 million for noneconomic damages for the remainder of 2002. The jury, however, awarded no past or future economic damages, and no future noneconomic damages for the remaining years of the decedent's estimated life.

The trial court thereafter entered judgment on the jury's verdict. Although, as required by MCL 600.6304(3), the judgment entered by the trial court properly apportioned liability for the $12 million award in direct proportion to each defendants' percentage of fault as found by the jury, the judgment further provided that defendants Mohamad Bazzi and Les Stanford Oldsmobile were also jointly and severally liable for the entire award. See MCL 600.6304(4) and MCL 600.6312(b)(iii).[4] However, the trial court later found that a release and satisfaction of judgment in the amount of $100,000 subsequently executed between plaintiff and defendant Hassan Bazzi rendered all liability for Hassan's pro rata share of the judgment, i.e., $3.6 million, satisfied. Accordingly, the trial court ordered that the liability of defendants Mohamad Bazzi and Les Stanford Oldsmobile for satisfaction of the $12 million judgment was thereafter limited to their own pro rata share of negligence, i.e. $8.4 million, as determined by the jury. The instant appeals followed the trial court's subsequent denial of defendants' post-judgment motions for a new trial or judgment notwithstanding the verdict.

II. Analysis

A. Directed Verdict in Favor of Sak's Party Store

Defendant Les Stanford Oldsmobile first argues that the trial court erred in granting a directed verdict in favor of defendant Sak's Party Store. We agree.

As previously noted, both Clutch Cargo's and Sak's Party Store were dismissed from this suit on separate motions for a directed verdict following the close of plaintiff's proofs. In seeking a directed verdict, counsel for Clutch Cargo's argued that the lack of any evidence of a "direct sale" of alcohol to Mohamad by the club precluded any liability on its part under the dramshop act, MCL 436.1801. The trial court agreed and, after concluding that the evidence offered on that matter was not sufficient to sustain anything other than speculation that Mohamad was served alcohol by the club, directed a verdict in favor of the club.

Counsel for Sak's Party Store thereafter also sought a directed verdict in favor of the store. In doing so, the store's counsel argued that there had been no evidence to contradict Mohamad's testimony that, although he had purchased two bottles of beer at the store on the

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[4] As discussed more thoroughly *infra*, although joint and several liability was essentially abrogated by tort-reform legislation enacted in 1995, MCL 600.6312(b)(iii) retains joint and several liability for cases in which an act or omission of a defendant that causes personal injury, property damage, or wrongful death is a crime involving the use of alcohol or a controlled substance, for which the defendant has been convicted.

night of the accident, he had consumed the contents of only one of those bottles. Thus, counsel argued, given the testimony of toxicologist Edgar Kivela, Ph.D., that the highest resulting blood alcohol level of .022 following consumption of that single beer would not have affected Mohamad's ability to drive, the evidence was insufficient to establish that the sale was a proximate cause of the accident in which the decedent was killed.

In response, counsel for Mohamad Bazzi noted that there was no dispute that Mohamad was intoxicated at the time of accident, or that he must have consumed more alcohol than he acknowledged during his testimony. Thus, counsel argued, a directed verdict in favor of the store was not warranted because Mohamad's testimony contradicted these facts and because, with the dismissal of Clutch Cargo's from the suit, the store was the only possible purveyor of the additional alcohol. Counsel for Les Stanford Oldsmobile also opposed the motion, noting that during his testimony Kassem Anani was inconsistent or otherwise unsure regarding whether Mohamad had consumed both bottles of the beer purchased at Sak's on the night of the accident. Counsel further noted that there remained an issue whether the fact that Mohamad might have consumed more alcohol after that illegally purchased at Sak's severs any proximate cause attributable to the store. The trial court, however, granted the store's motion, ruling that in light of the toxicologist's testimony that, even had Mohamad consumed both beers purchased at Sak's while en route to the club, "he never would have reached the level of intoxication that was shown by his blood alcohol at the time that he was at the hospital and the blood test was done," the evidence was insufficient to establish that Sak's unlawful sale of alcohol was a proximate cause of the decedent's death. We conclude that the trial court's decision to grant a directed verdict in favor of Sak's on this ground was error.

This Court reviews de novo a trial court's decision regarding a motion for directed verdict. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). In doing so, the Court must review the evidence and all legitimate inferences from the evidence in a light most favorable to the nonmoving party. *Id.* "A motion for directed verdict . . . should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law." *Id.*

The dramshop act, MCL 436.1801, prohibits the sale of alcoholic liquor to minors. MCL 436.1801(2). The act also gives an injured individual a cause of action against the person or entity that sold the alcohol to the minor, provided that "the unlawful sale is proven to be a proximate cause of the damages, injury or death." MCL 436.1801(3).[5] Specifically, the act provides:

> Except as otherwise provided in this section, an individual who suffers damage or who is personally injured by a minor or visibly intoxicated person by reason of the unlawful selling, giving, or furnishing of alcoholic liquor to the minor or visibly intoxicated person, if the unlawful sale is proven to be a proximate cause

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[5] With regard to claims premised on the wrongful furnishing of alcohol by licensees, the dramshop act "provides the exclusive remedy for money damages against a licensee arising out of the selling, giving, or furnishing of alcoholic liquor." MCL 436.22(10).

of the damage, injury, or death, or the spouse, child, parent, or guardian of that individual, *shall have a right of action in his or her name against the person who by selling, giving, or furnishing the alcoholic liquor has* ***caused or contributed to the intoxication of the person*** *or who has caused or contributed to the damage, injury, or death.* [*Id.* (Emphasis added).]

In concluding that Sak's was entitled to a directed verdict for want of evidence to support that its unlawful sale of alcohol was a proximate cause of the accident in which the decedent was killed, the trial court relied on testimony from plaintiff's toxicology expert, who indicated that the alcohol consumed by Mohamad from that sale was itself insufficient to generate the blood alcohol level indicated by the first post-accident blood draw, i.e., .11 grams per deciliter of blood. However, as correctly argued by defendant, a licensee's liability under the dramshop act is not so limited. To the contrary, the act imposes liability upon any licensee who, by the unlawful sale or furnishing of alcoholic liquor to a minor or visibly intoxicated person, has "caused or contributed" to intoxication that is the proximate cause of damage, injury, or death. See, e.g., *Mason v Lovins*, 24 Mich App 101, 114; 180 NW2d 73 (1970).

In *Mason, supra* at 106, the defendant was involved in a fatal automobile accident several hours after having consumed alcohol at a local tavern. Evidence offered at trial in the subsequent dramshop action against the tavern showed that the defendant construction worker went to the tavern at sometime between 11:00 a.m. and 12:00 p.m. that day, after having left a worksite as a result of bad weather. *Id.* While at the tavern the defendant consumed "three or more beers" while dining with several coworkers. *Id.* The defendant's coworkers testified that the defendant did not appear to be intoxicated at the time the group left the tavern and returned to the worksite at approximately 2:00 p.m. to clean the site before going home. *Id.* at 107. The defendant testified that after helping his coworkers clean the worksite, he traveled to the home of his uncle, approximately thirty to forty-five minutes away. *Id.* The defendant further testified that he did not return to the tavern after having left it, and that he had nothing to drink between the time he left the tavern and the time he arrived at his uncle's home. *Id.* However, the defendant's uncle testified that the defendant arrived at his home sometime between 3:30 p.m. and 4:30 p.m. so "deeply intoxicated" that he "fell to the floor," prompting the uncle to drive the defendant home approximately one hour later. *Id.* A toxicologist testified that to have been so inebriated that he could not stand up at 4:30 p.m. that day, the defendant would have had to have consumed in excess of ten beers. *Id.* at 109. The toxicologist further testified that to have accumulated the .24 percent blood alcohol level indicated by a urine sample taken from the defendant shortly after the accident, the defendant would have had to have consumed a minimum of eighteen bottles of beer. *Id.* at 108 n 5.

In affirming the jury's subsequent verdict in favor of the plaintiff in *Mason, supra*, this Court found that, when viewed in a light most favorable to the plaintiff, the evidence at trial was sufficient to permit the jury to reasonably conclude that the defendant had nothing to drink before reaching his uncle's house other than at the tavern, that he had consumed more than ten beers while at the tavern, and that, therefore, the tavern had sold the defendant beer at a time when he was already intoxicated. *Id.* at 113. Relying on precedent from our Supreme Court, the panel further noted that the tavern's liability for that sale continued regardless whether the defendant continued to drink after leaving the tavern:

> Under the dramshop act, a tavern which, by an unlawful sale, "contributes" to a particular intoxication is liable for damages caused during that intoxication by the intoxicated person. Accordingly, even if [the defendant] would not have remained intoxicated at the time of the accident but for the drinks he consumed after he left the tavern, the liability of the tavern continues as long as there was no break in the intoxication between the time preceding the illegal sale through the time of the accident. [*Id.* at 114.]

See also, *Larabell v Schuknecht*, 308 Mich 419, 422-423; 14 NW2d 50 (1944); *Johnson v Johnson*, 100 Mich 326, 327; 58 NW 1115 (1894).

In this case, plaintiff's toxicologist testified that of the .11 blood alcohol level registered approximately one hour after the accident, up to .022 could be attributed to the alcohol purchased, and admittedly consumed, by Mohamad at Sak's. The toxicologist further testified that although a .022 blood alcohol level would not have had a "significant" affect on Mohamad's ability to drive, "alcohol concentration even at levels as low as .02" grams per deciliter of blood will nonetheless affect the ability of a person's brain to process information received from the fives senses. The toxicologist also testified that with a blood alcohol level of .11 grams per deciliter of blood, a person would be "unable" to process this information and would take longer to react to a given situation. Specifically, the toxicologist testified that the person would be:

> limited in what they can see because the processing center can't take all the information in. So as they're looking at something concentrating on a task, other things which are going on while they're concentrating on that task will disappear. They won't see things on the outside. As they look at something that's ahead of them, for instance, they will be unable to process the information as to how far away it is as rapidly as they should.

Further, given the toxicologist's testimony that Mohamad's body metabolizes alcohol at a rate of .02 grams per deciliter per hour, the blood alcohol level attributable to consumption of only one of the beers purchased at Sak's could have been as high as .042 grams per deciliter of blood at the time of the crash. Moreover, contrary to plaintiff's assertion, Kassem Anani's testimony that Mohamad drank during the entire drive to Clutch Cargo's directly contradicts Mohamad's claim that he threw out all alcohol after stopping to allow his friends to vomit along the side of I-75. When viewed in light most favorable to nonmoving party, this evidence permits a legitimate inference that Mohamad consumed more than the one bottle claimed by Mohamad, and that his consumption of that alcohol, at the very least, contributed to the intoxication. *Sniecinski, supra.*

Although Mohamad claimed at trial to have struck the semi-trailer only because he was "cut off" by Hassan with the Corvette, other testimony and evidence offered at trial indicates that Mohamad appeared to have misjudged his speed and distance relative to the semi. When viewed in a light most favorable to the nonmoving parties, the foregoing testimony was sufficient to permit a jury to conclude that the unlawful sale of alcoholic liquor by Sak's "caused or contributed" to Mohamad's intoxication at the time of the accident, and that the intoxication was a proximate cause of the accident. *Mason, supra.* Accordingly, we conclude that the trial court erred in granting a directed verdict in favor of the party store. *Sniecinski, supra.* Moreover,

because, as explained below, the trial court similarly erred in finding defendant Les Stanford Oldsmobile jointly and severally liable for the judgment at issue here, the error was not harmless.

B. Joint and Several Liability under MCL 600.6312(b)(iii)

Defendant Les Stanford Oldsmobile also argues that the trial court erred in concluding that it is jointly and severally liable for the entirety of the jury award, pursuant to MCL 600.6312(b)(iii), which retains such liability where the act or omission of a defendant causing death or injury involves the use of alcohol or a controlled substance, and constitutes a crime for which that defendant has been convicted. Again, we agree.

It is not disputed that, having been convicted of operating a motor vehicle under the influence of intoxicating liquors causing both death and serious personal injury in violation of MCL 257.625, defendant Mohamad Bazzi is subject to the joint and several liability provided for under MCL 600.6312(b)(iii). Whether this same liability is imputed to defendant Les Stanford Oldsmobile, as the owner of the vehicle being driven by Mohamad at the time of these violations, presents a question of statutory interpretation, which this Court reviews de novo. *Solution Source Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 372; 652 NW2d 474 (2002).

"The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature," and "[t]he first step in determining legislative intent is to review the language of the statute itself." *Id.* at 372-372. "If the statute is unambiguous, the Legislature is presumed to have intended the meaning it plainly expressed and judicial construction is neither required nor permitted." *Id.* at 373.

MCL 600.6312 provides, in relevant part, as follows:

> A defendant that is found liable for an **act or omission** that **causes** personal injury, property damage, or wrongful death is jointly and severally liable if ***the defendant's act or omission*** *is any of the following*:
>
> * * *
>
> (b) A crime involving the use of alcohol or a controlled substance for which ***the defendant*** is convicted and that is a violation of 1 or more of the following:
>
> * * *
>
> (iii) Section 625 of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.625 of the Michigan Compiled Laws. [Emphasis added.]

As indicated by the language emphasized above, the statute imposes joint and several liability under circumstances where a defendant has been found liable for an act or omission that "causes" personal injury, property damage, or wrongful death, but only if that "act or omission" constitutes a specified crime for which that defendant has been convicted. Plaintiff correctly points out that, by use of the indefinite article "a" the statute, at its outset, draws in any defendant "that is found liable for an act or omission that causes personal injury, property damage, or wrongful death." However, use of the more definite article "the" in both the body of the statute

and again in subsection (b), limits that liability to a particular defendant, i.e., one whose "act or omission" constitutes an enumerated offense for which that defendant has been convicted. See *Hagerman v Gencorp Automotive*, 457 Mich 720, 728-729; 579 NW2d 347 (1998) ("the" is an article that particularizes the subject spoken of by reference to that certain object).

Here, defendant Les Stanford Oldsmobile's liability for the decedent's death derives from the owner's liability statute, MCL 257.401(1), which imposes liability upon the owner of a motor vehicle "for an injury caused by the negligent operation of the motor vehicle." However, as recognized by our Supreme Court in *Roberts v Posey*, 386 Mich 656, 662; 194 NW2d 310 (1972), the owner liability statute "makes the owner liable, not because he caused the injury, but because he permitted the driver to be in a position to cause the injury." As such, the "act or omission" for which the dealership was found to be liable, i.e., express or implied consent to operate the vehicle, does not constitute the "cause" of the death at issue here within the meaning of MCL 600.6312(b)(iii). See *Roberts, supra.* Moreover, even were we to conclude that such knowledge or consent constitutes an "act or omission that causes" death or personal injury within the meaning of MCL 600.6312(b)(iii), such an act or omission simply is not one of the specified crimes for which the statute requires a particular defendant on which joint and several liability is to be imposed, to have been convicted.

Plaintiff nonetheless asserts that the liability imposed under the owner liability statute is vicarious in nature and that, therefore, there is no distinction between defendants Les Stanford Oldsmobile and Mohamad Bazzi for purposes of applying MCL 600.6312(b)(iii). However, that argument is not borne out by the plain language of the MCL 600.6312(b)(iii), to which this Court is bound. See *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002); see also, e.g., *People v Hock Shop, Inc*, 261 Mich App 521, 528; 681 NW2d 669 (2004) (where a statute contains no express provision for vicarious, criminal liability, a court may not read legislative intent to impose such liability into the statute). Consequently, we conclude that the trial court erred in finding defendant Les Stanford Oldsmobile to be jointly and severally liable under MCL 600.6312(b)(iii).

Moreover, because the trial court erred in both its decision to grant a directed verdict in favor of defendant Sak's Party Store and in finding defendant Les Stanford Oldsmobile to be jointly and severally liable pursuant to MCL 600.6312(b)(iii), judgment in this matter must be reversed. These errors removed from the jury the ability to determine, as required by MCL 600.6304(1), any fault for the decedent's death attributable to Sak's unlawful sale of alcohol to defendant Mohamad Bazzi. See *Jones v Enertel, Inc*, 254 Mich App 432, 436-437; 656 NW2d 870 (2003). Because a finding of such fault would have decreased any several liability of defendant Les Stanford Oldsmobile, judgment in this matter must be reversed.

C. Other Issues

1. Pretrial Agreements Respecting Settlement

Although we have concluded that the trial court's decision to grant a directed verdict in favor of Sak's Party Store constitutes an error requiring reversal, we find it appropriate to provide guidance with regard to several issues that may arise on remand. In doing so, we first address the argument of defendants Les Stanford Oldsmobile and Mohamad Bazzi concerning the trial court's refusal to inform the jury of settlement agreements made between plaintiff and

defendants Hassan Bazzi, Clutch Cargo's, and Sak's Party Store. Defendants argue that the failure to disclose these agreements to the jury while allowing these codefendants to participate at trial subverted the adversarial process and denied them a fair trial. The question whether, and to what extent, jury's should be informed of agreements of the type at issue here is one of first impression in this state.

At the outset of trial, the parties were ordered to disclose to the trial court whether any settlement agreements had been reached and, if so, the terms of those agreements. Counsel for Clutch Cargo's thereafter disclosed that it had reached a "high-low" agreement with plaintiff under which plaintiff would receive a minimum award of $25,000 and a maximum award of $50,000, depending on the verdict following trial. Counsel for defendant Hassan Bazzi disclosed a similar agreement with plaintiff under which plaintiff was guaranteed a minimum award of $90,000 and a maximum award of Hassan's insurance policy limit of $100,000. A third agreement, also termed to be a "high-low" agreement by the parties, was disclosed by counsel for defendant Sak's Party Store. However, under the terms of that agreement plaintiff was to receive the store's insurance policy limit as both the "high" and the "low." According to plaintiff, no releases had been executed for these agreements before trial.

Counsel for defendants Mohamad Bazzi and Les Stanford Oldsmobile questioned the propriety of the continued participation of the settling defendants without disclosure of the agreements to the jury. The trial court, however, indicated that the agreements were not relevant and declined to inform the jury of their existence. On appeal, defendants argue that the trial court's failure to inform the jury of these "*Mary Carter*-style" agreements denied them a fair trial.[6]

In *Smith v Childs*, 198 Mich App 94, 97-98; 497 NW2d 538 (1993), this Court stated:

> The distinguishing characteristics of a *Mary Carter* agreement are that it (1) not act as a release, so the agreeing defendant remains in the case, (2) is structured in a way that it caps the agreeing defendant's potential liability and gives that defendant an incentive to assist the plaintiff's case against the other defendants,

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[6] As explained by our Supreme Court in *Rogers v Detroit*, 457 Mich 125, 150 n 22; 579 NW2d 840 (1998), overruled on other grounds by *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000):

> The term "*Mary Carter* Agreement" as defined by Black's Law Dictionary (6th ed) arises from the agreement popularized by the case of *Booth v Mary Carter Paint Co*, 202 So 2d 9 (Fla App, 1967). It refers to an agreement between the plaintiff and some, but fewer than all, defendants whereby the parties place limitations on the financial responsibility of the agreeing defendants. The extent of responsibility is usually in inverse ratio to the amount the plaintiff is able to recover against the nonagreeing defendant or defendants. In certain states, such agreements are void as against public policy, while, in others, they are permissible if disclosed to the jury.

and (3) is kept secret from the other parties and the trier of fact, causing all to misunderstand the agreeing defendant's motives.

Although noting that other jurisdictions "have found that such agreements deny the nonagreeing defendants a fair trial," the panel in *Smith*, *supra* at 98, concluded that the agreement at issue there did not constitute a *Mary Carter* agreement and, therefore, did not itself reach the issue of the propriety of such agreements in Michigan.[7] Defendants concede that the agreements at issue here are not prototypical *Mary Carter* agreements. Indeed, although the agreements were not disclosed to the jury, they were not kept secret from the trial court or the non-settling defendants, and did not act as a release. See *id.* at 97-98. Nonetheless, as argued by defendant, an agreement that deprives the settling defendant of any significant financial interest in the amount recovered against any non-settling defendant, distorts the adversarial process and potentially undermines both the right to a fair trial and the integrity of the judicial system. *Id.* at 98. As stated by the Florida Supreme Court in *Dosdourian v Carsten*, 624 So 2d 241, 243 (Fla, 1993):

> "Under our adversary system a jury can usually assume that the parties and their counsel are motivated by the obvious interests each has in the litigation. That assumption is no longer valid when the parties have actually made an agreement to the contrary prior to trial. The fairness of the system is undermined when the alignment of interests in the litigation is not what it appears to be.
>
> Jurors are also deceived by being informed that they are resolving an existing dispute between parties that have already resolved their differences. In our view, this undermines the integrity of the jury system which exists to fairly resolve actual disputes between our citizens. Hence, even if the parties and counsel conduct themselves with honesty and integrity, a cloud of doubt remains over the proceedings because of the information withheld from the jurors." [quoting, *Dosdourian v Carsten*, 580 So 2d 869, 872 (Fla App, 1991).]

As recognized by the language quoted above, the primary danger of such an agreement is that the settling defendant will fail to operate as an adversary. This is most significantly a danger in the traditional *Mary Carter* agreement, where the settling defendant has reason to inflate the damages of the plaintiff because that party's exposure is reduced proportionally to the full amount of damages awarded. However, this distortion is also present where a defendant has fully settled, as defendant Sak's Party Store clearly had, yet remains involved in the litigation, and may also be present, although in a more subtle form, where a defendant has reached a "high-low" agreement and yet also remains involved in the litigation.[8] See *Dosdourian*, *supra* at 247.

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[7] Although similarly noting that such agreements deny a fair trial to those defendants who are not part of the agreement, the Court in *Rogers*, n 6 *supra*, also did not reach the issue of the propriety of such agreements in Michigan, having concluded that there was "no direct evidence that a *Mary Carter* agreement was ever established." *Id.* at 151.

[8] Plaintiff argues that "high-low" agreements such as those at issue here are "commonplace in high stakes litigation," and have been recognized by this Court "without reproach." However, each of the cases relied upon by plaintiff as support for this proposition involved agreements
(continued...)

With respect to these latter agreements the distortion of the adversarial process is arguably less pronounced because, given the range of awards provided for in a "high-low" agreement, the settling defendants retain an interest in ensuring that the total amount of damages is as small as possible. Nonetheless, the integrity of the judicial system is placed into question when a jury charged with the responsibility to determine the liability and damages of the parties is denied the knowledge that there is, in fact, an agreement regarding damages between a number of the parties. Consequently, wise judicial policy must favor disclosure of such agreements to the jury.

It must be recognized, however, that the public policy of Michigan also favors settlements. *Stefanac v Cranbrook Ed Community (After Remand)*, 435 Mich 155, 163; 458 NW2d 56 (1990). Moreover, as noted by our Supreme Court in *Brewer v Payless Stations, Inc*, 412 Mich 673, 678; 316 NW2d 702 (1982), jury disclosure of the fact and terms of a settlement agreement is a "two-edged sword" that "cuts both ways."

> For example, the mere fact of settlement by a codefendant could suggest liability on the part of a blameless non-settling defendant. The amount of the settlement, if large, might tend to suggest a higher value of a claim. If small, the jury might tend to "make it up" by a higher verdict as to the non-settling tortfeasor. See *Orr v Coleman*, 455 SW2d 59 (Ky, 1970), in which the court found jury consideration of the fact and amount of settlement prejudicial to defendant non-settling tortfeasor.
>
> On the other hand, a small settlement could disadvantage a plaintiff if the jury perceived that amount as bearing on the total value of the claim. The jury also might consider its duty to be diminished by settlement or consider the amount involved to be adequate regardless of the non-settling defendant's liability.
>
> It is true that juries are expected to consider complicated facts and instructions and that our adversary system relies upon their ability to do so before reaching their conclusions. It is also true that jurors are human and so are subject to suggestion and sometimes to confusion concerning the relative importance of a mass of factual material and its relationship to instructions from the bench. [*Id.* at 678-679.]

Thus, even when a true *Mary Carter* agreement is present, jurisdictions permitting such agreements but requiring disclosure of its terms recognize that such disclosure must be thoughtfully limited to avoid prejudice. See *Carter v Tom's Truck Repair, Inc*, 857 SW2d 172, 178 (Mo, 1993). Specifically, matters such as the amount of a settlement and references to insurance are generally barred from disclosure to the jury. *Id.* Consequently, we conclude that, in cases such as this, the interest of fairness served by disclosure of the true alignment of the parties to the jury must be weighed against the countervailing interests in encouraging settlements and avoiding prejudice to the parties. However, because agreements to settle claims

(...continued)

entered into between all parties to the suit. See, e.g., *Phillips v Mirac, Inc*, 251 Mich App 586, 588 n 2; 651 NW2d 437 (2002). Consequently, the fairness of the adversarial process to a non-settling defendant was not implicated, as it is here. Moreover, in none of those cases was the propriety of the agreement at issue on appeal.

between parties who nevertheless remain at trial are virtually limitless in their possible variations, this balance will of necessity be struck differently depending on the facts of each case. Thus, parties must rely on the sound discretion of the trial court to ensure that, whatever the circumstances of a particular case, the integrity of the adversary process is preserved. Indeed, the trial court has both the duty and the discretion to fashion procedures that ensure fairness to all litigants in these situations. See *Anthony v Cochrane*, 295 Mich 386, 391; 295 NW2d 197 (1941); *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 293; 602 NW2d 854 (1999). Here, the trial court's failure to so weigh the interests and fashion such a procedure deprived the non-settling defendants of a fair trial, i.e., one in which in which the true alignment of the parties is known to the trier of fact. *Dosdourian, supra.* Consequently, should any similar agreements be reached between the parties on remand, the trial court must craft a means of disclosure that reasonably ensures fairness to each of the litigants.

2. Apportionment of Conduct More Culpable than Negligence under MCL 257.401

Defendant Les Stanford Oldsmobile also argues that the trial court erred in refusing to instruct the jury that, as the owner of the vehicle being driven by Mohamad Bazzi at the time of the accident, the dealership was liable only for Mohamad's ordinary negligence. We disagree. This Court reviews a trial court's decision regarding jury instructions for an abuse of discretion. *Chastain v General Motors Corp (On Remand)*, 254 Mich App 576, 590; 657 NW2d 804 (2002).

As previously noted, defendant Les Stanford Oldsmobile's liability stems from the owner's liability statute, MCL 257.401, which provides that "[t]he owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law." In *Peyton v Delnay*, 348 Mich 238; 83 NW2d 204 (1957), our Supreme Court was called upon to interpret the liability of the owner of a motor vehicle in a suit brought under the now repealed guest passenger provision of the owner's liability statute.[9] The defendant owner there claimed that if the driver was guilty of gross negligence or wilful and wanton misconduct, the owner would not be liable because, under MCL 257.401, only ordinary negligence is imputed to the owner. *Id.* at 246. The Court, in rejecting the owner's claim, found that "the language of the statute imposes liability on the owner where, as here, consent to and knowledge of the driving are conceded and the operator is found guilty of 'willful and wanton misconduct.'" *Id.* at 248. The Court further noted that the owner's liability statute constitutes:

> a measure adopted by the legislature to promote public safety by holding automobile owners accountable for certain negligent acts of the persons to whom they entrust their automobiles. It would be a strange construction of such a statute

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[9] The guest passenger provision of MCL 257.401, which precluded a guest passenger in an automobile from bringing suit against an owner or operator except upon proof of gross negligence or willful and wanton misconduct by the driver, was declared unconstitutional in *Manistee Bank & Trust Co v McGowan*, 394 Mich 655, 663; 232 NW2d 636 (1975), overrule in part on other grounds by *Harvey v Michigan*, 469 Mich 1, 14; 664 NW2d 767 (2003), and the statute was later amended to exclude that provision. See 1988 PA 125.

> to hold an owner [liable] for the ordinary negligence of the person whom he allowed to drive his car and free him from liability if his chosen driver was found guilty of gross negligence or wilful and wanton misconduct. [*Id.* at 248-249 (citations omitted).]

Cf. *Berry v Kipf*, 160 Mich App 326, 329-330; 407 NW2d 648 (1987) (owner not liable for intentional acts of permissible driver). Because the instruction requested by defendant was contrary to the holding in *Peyton, supra*, the trial court did not abuse its discretion in refusing to so instruct the jury. *Chastain, supra.*

3. The Wrongful-Conduct Rule

Defendant Mohamad Bazzi also argues that the trial court erred in denying his motion for judgment notwithstanding the verdict, premised on the ground that any claim for the wrongful death of Ronny Hashem was barred under the "wrongful-conduct rule" of *Orzel v Scott Drug Co*, 449 Mich 550; 537 NW2d 208 (1995).[10] We disagree. A trial court's decision regarding a motion for judgment notwithstanding the verdict is reviewed de novo. *Sniecinski, supra.*

The wrongful-conduct rule provides that when "a plaintiff's action is based, in whole or in part, on his own illegal conduct," his claim is generally barred. *Orzel, supra* at 558. The rule rests on the public policy premise that courts should not, directly or indirectly, encourage or tolerate illegal activities. See *id.* at 559-560. As conduct providing the basis for application of the wrongful-conduct rule in furtherance of these policies, defendant cites the decedent's unlawful consumption of alcohol as a minor and participation in the "drag race" between Hassan and Mohamad Bazzi. See MCL 436.1703(1) and MCL 257.626a. However, that a plaintiff was engaged in illegal conduct at the time of his injury does not automatically bar his claim. Rather, to implicate the rule, the conduct must be serious in nature and prohibited under a penal or criminal statute. *Id.* at 561. Further, the wrongful-conduct rule only applies if there exists a sufficient causal nexus between the plaintiff's illegal conduct and the asserted damages. *Id.* at 564.

Initially, we note that the misdemeanor conduct alleged here is not of the type that typically invokes the application of the wrongful-conduct rule. See *id.* at 561. With respect to such conduct, the *Orzel* Court specifically noted that "where the plaintiff's illegal act only amounts to a violation of a safety statute, such as traffic and speed laws or requirements for a safe workplace, the plaintiff's act, while illegal, does not rise to the level of serious misconduct sufficient to bar a cause of action by application of the wrongful-conduct rule." *Id.*; see also, e.g., *Longstreth v Gensel*, 423 Mich 675; 377 NW2d 804 (1985) (wrongful death action not barred where minor plaintiff violated the statute prohibiting driving while under the influence of alcohol); *Poch v Anderson*, 229 Mich App 40, 48-52; 580 NW2d 456 (1998) (unlawful

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[10] Because an action for wrongful death is derivative in that the representative of the deceased stands in the latter's shoes, plaintiff, as the personal representative of the decedent's estate, has no better claim than the decedent would have had himself. See *Toth v Goree*, 65 Mich App 296, 298; 237 NW2d 297 (1975).

furnishing of alcohol to minor defendant by plaintiff did not bar suit for damages). However, even were we to conclude that the conduct at issue here was sufficiently serious to warrant application of the wrongful-conduct rule, the evidence at trial failed to establish the causal connection also necessary to bar the instant suit on that ground. Although it was not disputed at trial that the decedent unlawfully purchased and consumed alcohol on the night of his death, there was nothing in the evidence presented at trial to indicate the requisite "causal nexus" between such conduct and the asserted damages. *Orzel, supra.* As explained by this Court in *Poch, supra* at 49:

> "For a plaintiff to be barred of an action for negligent injury . . . his injury must have been suffered while and as a proximate result of committing an illegal act. The unlawful act must be at once the source of both his criminal responsibility and his civil right. The injury must be traceable to his own breach of the law and such breach must be an integral and essential part of his case." In other words, 'if a complete cause of action can be shown without the necessity of proving the plaintiff's illegal act, the plaintiff will be permitted to recover notwithstanding that the illegal act may appear incidentally and may be important to the explanation of other facts in the case.' [quoting *Manning v Bishop of Marquette*, 345 Mich 130, 136; 76 NW2d 75 (1956) and 1 Am Jur 2d, Actions, § 45, p 753.]

Because plaintiff was not required to prove the decedent's violation of MCL 436.1703(1) in order to plead his claim for wrongful death, the fact that the decedent violated the statute by purchasing and consuming alcoholic beverages did not bar the instant suit. Similarly, and contrary to defendant's assertion, although there was testimony from which it could be concluded that Hassan and Mohamad Bazzi were racing, and that this conduct contributed to the accident in which the decedent was killed, there is no evidence to indicate that the decedent willingly participated in the high speed driving that contributed to his death. Cf. *Robinson v Detroit*, 462 Mich 439, 452 n 10; 613 NW2d 307 (2000) ("[c]ulpable passengers have no greater claim to benefit from . . . wrongful conduct than does the driver"). To the contrary, the testimony offered at trial indicates that the decedent was strongly opposed to the manner and rate of speed at which Mohamad was driving, and pleaded that he slow down. Accordingly, because the evidence at trial failed to show a causal connection between the accident in which the decedent was killed and any culpable misconduct on his part, the trial court did not err in denying defendant's motion for judgment notwithstanding the verdict on this ground.

4. Expert Testimony Concerning Present Value of Future Damages

Defendant Les Stanford Oldsmobile also argues that it is entitled to a new trial, or remittitur, as a result of the trial court's decision to permit economist Michael Thompson to testify concerning the effect of inflation on an award of future noneconomic damages. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 508; 679 NW2d 106 (2004).

With respect to future noneconomic damages Thompson testified by way of example, using a chart to demonstrate "how to make an adjustment for inflation over time." On appeal, defendant asserts that the trial court erred in permitting this testimony because it invited the jury to nullify the requirement of MCL 600.6306(1)(e) that an award of future noneconomic damages be reduced to present value.[11] We disagree.

Defendant does not dispute that the testimony at issue was relevant to the jury's task of determining the value of any award of future noneconomic damages. MRE 401. Nor does defendant dispute that expert testimony that assists a jury in the determination of such a task is generally admissible under MRE 702. Moreover, to the extent that defendant implies that MCL 600.6306 precludes the jury from itself awarding damages at present value, we note that the statute governs only the procedure for entering an order of judgment following a jury verdict. Specifically, the statutes provides, in relevant part that:

> [a]fter a verdict rendered by a trier of fact in favor of a plaintiff, an order of judgment shall be entered by the court. . . . [T]he order of judgment shall be entered against each defendant, including a third-party defendant, in the following order and in the following judgment amounts:
>
> * * *
>
> (e) All future noneconomic damages reduced to gross present cash value. [MCL 600.6306(1)(e).]

A plain reading of the above language, see *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999), makes clear that the statute does not require the trial court to itself reduce a plaintiff's future noneconomic damages to present value. Rather, the statute simply states that the order of judgment must include such damages reduced to present cash value. Accordingly, we reject defendant's assertion that the challenged testimony impermissibly permitted the jury to "nullify" or otherwise contravene the requirements of MCL

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[11] As evidence of such nullification, defendant points to the jury's limitation of its award of future noneconomic damages to a lump sum amount for a single year. However, by failing to object or otherwise ask that the trial court redirect the jurors to apportion future damages after they first returned with their verdict, defendant has waived any right to review of this alleged error. See *Byrne v Shneider's Iron & Metal, Inc*, 190 Mich App 176, 184; 475 NW2d 854 (1991). Defendant has also waived or otherwise forfeited review of any concomitant error arising from the closing argument of plaintiff's counsel, during which counsel requested that the jury consider Thompson's testimony when determining "the monetary damages you want the family to get now." Although counsel for defendant challenged the propriety of this argument during discussion of jury instructions the following day, he offered no objection at the time of the argument. Moreover, with the express acquiescence of counsel for defendant, a curative instruction was proposed and later relayed to the jury. By expressing satisfaction with and accepting the trial court's curative instruction, defendant extinguished any error arising from the allegedly improper argument. See *People v Carter*, 462 Mich 206, 218-220; 612 NW2d 144 (2000). Accordingly, we decline to address these matters further.

600.6306. Indeed, this Court has previously held that where a jury awards damages already reduced to present value, a trial court does not err by refusing to further reduce the damages according to the requirements of MCL 600.6306. *Setterington v Pontiac Gen Hosp*, 223 Mich App 594, 607; 568 NW2d 93 (1997). Consequently, the trial court did not abuse its discretion by admitting the challenged testimony.[12]

5. Evidence of Marijuana Ingestion

Defendant Mohamad Bazzi argues that the trial court erred in refusing to admit evidence related to the presence of marijuana-related tetrahydrocannabinol (THC) metabolites detected by a toxicology screen conducted during the autopsy of the decedent Hashem. We disagree.

Defendant asserts that the trial court's refusal to admit the subject evidence, consisting of a toxicology report and testimony from the medical examiner and toxicologist Werner Spitz, M.D., was admissible to show that the decedent's use of marijuana rendered him "unable or unwilling to take steps to protect" himself on the night of his death and, therefore, was a cause of that death. With respect to the testimony of Dr. Spitz, defendant asserts that, if permitted, Spitz would have testified "as to what 500 nanograms of marijuana would mean in Ronny Hashem's blood as to the clouding of his judgment." Defendant, however, made no offer of proof below regarding the substance of Spitz' testimony, as required by MRE 103(a)(2), and fails to even allude to the substance of that testimony on appeal. Consequently, appellate review of the admissibility of that testimony is precluded. See *In re Green Charitable Trust*, 172 Mich App 298, 329; 431 NW2d 492 (1988). Moreover, defendant's argument is factually flawed.[13] Contrary to defendant's assertion, although the record indicates that testing of Hassan Bazzi shortly after the accident revealed THC metabolite levels totaling "500 nanograms," the medical examiner's testimony and toxicology report indicate that only 12 nanograms of the same metabolite was detected in the decedent. With respect to the significance of this metabolite, the medical examiner testified that although a component of marijuana, only the metabolites of THC were detected during the toxicology screen. Although acknowledging that he was not himself a toxicologist, the medical examiner further testified that more recent marijuana use would result in the THC compound itself being present in the blood and that, depending on the amount actually ingested, the levels detected in the decedent indicated that ingestion could have occurred anywhere from a few hours to one week before the night of the accident. Given this testimony, and considering defendant's failure to properly preserve this argument below, we find no manifest injustice in the exclusion of the challenged evidence, and conclude that appellate review of this issue has been waived. See *Napier v Jacobs*, 429 Mich 222, 227-229; 414 NW2d 862 (1987). Whether such evidence should be admitted at any trial on remand is a question left to the

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[12] Because we conclude that this matter must be remanded for a new trial, we do not reach defendant Les Stanford Oldsmobile's claim that the trial court further abused its discretion by denying its motion for remittitur premised on a comparison of the verdict awarded here to that awarded in other "comparable" cases. For this same reason, we need not address the propriety of the trial court's decisions regarding the effect of the release and satisfaction of judgment executed between plaintiff and defendant Hassan Bazzi.

[13] At oral argument counsel for Mohammed Bazzi forthrightly acknowledged this error.

discretion of the trial court, following a proper offer of proof establishing the relevance and probative value of the evidence, if any. See MRE 401, 403.

We reverse and remand. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello

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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT
(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

LACY HARTER and MIKE McCLELLAND,
As Co-Personal Representatives of the Estate of
KEGAN McCLELLAND, Deceased and LACY HARTER,
Individually and MIKE McCLELLAND, Individually,

Plaintiffs-Appellees,

vs.

GRAND AERIE FRATERNAL ORDER OF EAGLES,

Defendant-Appellant,

and
HOWELL AERIE #3607 FRATERNAL ORDER
OF EAGLES,

Defendant-Appellee,

and-

MICHIGAN STATE AERIE FRATERNAL ORDER
OF EAGLES, HARRIS SEPTIC CLEANING AND
ALWAYS CLEAN PORTABLE TOILETS, INC.,
DALE HARRIS, Individually, and AMERICAN
CONCRETE PRODUCTS, INC., Individually,

Defendants, Not Participating.

Supreme Court Docket No:126255

COA Docket No: 244689
L.C. Case No. 00-17892-NO
HON. DANIEL A. BURRESS

COURT OF APPEALS PANEL:
HON. JESSICA COOPER
HON. KAREN FORT HOOD
and
DISSENTING:
HON. PETER D. O'CONNELL

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PROOF OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF WAYNE)

JOYCE K. MILLER, being duly sworn, deposes and says that on the 30th day of August, 2005, she served a copy of **MCR 7.212(G) SUPPLEMENTAL AUTHORITY BRIEF NO. 2** and this **PROOF OF SERVICE** to be served upon the following:

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by placing said copy in an envelope correctly and plainly addressed to the above noted attorneys, and depositing said envelopes in the United States Mail with first class postage thereon fully prepaid.

Further Deponent sayeth naught.

Joyce K. Miller
JOYCE K. MILLER

Subscribed and sworn to before
me this 30th day of August, 2005.

Dolores J. Bader
DOLORES J. BADER, NOTARY PUBLIC
Wayne County, Michigan
My Commission Expires: 7/10/11
Acting in Wayne County, Michigan

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August 30, 2005

VIA DHL OVERNIGHT DELIVERY

Clerk of the Court
MICHIGAN SUPREME COURT
925 W. Ottawa, 4th Floor
Lansing, MI 48915

RE: Harter, et al v Grand Aerie Fraternal Order Of Eagles, et al
Supreme Court Docket No: 126255
Court of Appeals Docket No: 244689
Livingston County Circuit Court Case No. 00-17892-NO
Our File No. JPJOC.2123J

Dear Sir/Madam:

Enclosed for filing in the above identified matter, please find the original and ten (10) copies of the **DEFENDANT-APPELLANT'S MCR 7.2112(G) SUPPLEMENTAL AUTHORITY BRIEF NO. 2 and PROOF OF SERVICE.** Kindly file in your usual fashion returning date stamped copies back to this office via my the enclosed self-addressed-stamped-envelope.

Thank you for your attention to this matter.

Sincerely,

John P. Jacobs

JPJ/jkm

Enclosures

cc: Geoffrey N. Fieger, Esq./Robert M. Giroux, Esq.
Mark R. Bendure, Esq.
John A. Cothorn, Esq.
Charles C. Cheatham, Esq.